

The Arkansas Register



Volume XXVIII, Number 2

August 2004

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Secretary of State
State Capitol, Room 026
Little Rock, AR 72201-1094

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Published by *Secretary of State*
Charlie Daniels

The *Arkansas Register* is an official publication of the State of Arkansas. It contains administrative rules and regulations adopted by state agencies, boards and commissions pursuant to Act 434 of 1967, as amended. The *Arkansas Register* also includes Attorney General opinions, notice of legislative audit reports and insurance orders. The subscription rate is \$40 per year or \$3.50 a copy, distributed monthly, postpaid within the United States.

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ATTORNEY GENERAL OPINIONS

Opinion No.: 2004-157

Matayo, Doug
State Representative

RE:Q1) Can a city legally sell a franchise for a particular route through the city to a carriage company if the route includes state highways? Q2) If the city may legally sell said franchise, are they required by law to offer the route up for bidding to the public or may they sell it at their own discretion? **RESPONSE:** Q1) No, regardless of whether the route includes state highways. Although cities can grant franchises, see ACA 14-43-609(5), they are not authorized to sell them. Q2) In light of my response to Q. 1, this question is moot.

Opinion No.: 2004-163

Napper, Steve
State Representative

RE:In light of the provisions of A.C.A. 6-17-410 and the conclusions reached in Op. Attorney Gen. 2003-057, does different reasoning apply for those applicants whose information was expunged under A.C.A. 16-93-301 et seq., prior to the enactment of A.C.A. 16-90-901 et seq., such that this information is not disqualifying? Q2) Must expungement information provided to the Department of Education in accord with the directive of AG Op. 2003-057 be kept confidential? **RESPONSE:** 1) No. I believe the two referenced expungement statutes are effectively identical in defining the legal effect of an expungement. 2) I do not believe the statutory confidentiality provisions relating to expungements defeats the open-meetings requirement of the Freedom of Information Act. Although the Board of Education may enact rules to safeguard the privacy of expungement information, I believe any hearing relating to an expungement must be public.

Opinion No.: 2004-170

Adcock, Robert H., Jr.
Bank Commissioner

RE:Will current Arkansas law allow commercial banks to use or require types of personal identification known as biometric identifiers, i.e., fingerprints, etc., for customer identification purposes? **RESPONSE:** Generally "yes," but may want to contact the Office of the Comptroller of the Currency for any federal law issues.

Opinion No.: 2004-179

Laverty, Randy
State Senator

RE:Does ACA 24-11-812 authorize the Harrison City Council to restore their current .0004 tax millage for the firemen's pension and relief fund back to a full one mill tax (which existed before application of Amendment 59), without a vote of the electorate? **RESPONSE:** No. See *Wright v. Storey*, 298 Ark. 508, 769 S.W.2d 16 (1989). See also Amendment 31.

Opinion No.: 2004-180

James, T. Kenneth
Director, Arkansas Department of Education

RE:Q1) If a bond issue was issued by a "qualified school district" under ACA 6-20-2003(8) and this issue is subsequently refunded with a non-voted refunding issue outside the dates shown in ACA 6-20-2003(8)(A) and (B), is the district still eligible to receive debt service funding supplement on the debt with the higher annual payment as described in ACA 6-20-2003(9)(a)? Q2) If a bond issue was issued by a "qualified school district" under ACA 6-20-2003(8)(A) and (B), and this issue is subsequently refunded with a voted combination project and refunding issue outside the dates shown in ACA 6-20-2003(8), is the district still

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eligible to receive debt service funding supplement on the new debt payment (see ACA 6-20-2003(9)(b))? Q3) According to ACA 6-20-2003(9)(a), the payment schedule of the "issue being refunded" will be compared to the payment schedule of the "refunding issue." This applies to non-voted refunds that are completed in order to produce interest savings and reduce the annual payments. If bonds are refunded more than once, will the comparison be made to the original issue with the largest payments or the second issue with the second largest payments? RESPONSE: Q1) No. The debt service supplement is available only on bonds issued before May 30, 2004. Q2) No, for the reasons stated in response to Q.1. Q3) It is unlikely that multiple refundings would have occurred between the initiation of the debt service supplement program and the May 30, 2004 cut-off date. If they have occurred, the comparison must be made between the last two issues.

Opinion No.: 2004-182

Williams, Kit
City Attorney

RE:Request for approval of a proposed interlocal cooperation agreement between Washington County and the City of Fayetteville concerning the expenditure of funds received from the Arkansas Department of Emergency Management. RESPONSE: Approval unnecessary.

Opinion No.: 2004-183

Jones, Steve
State Representative

RE:Can a sitting member of the County Election Commission run for a public office? Could said member, for example, serve on the Democratic or Republican Central Committee? Q2) If allowed to run for office, would it matter if they are opposed or unopposed? RESPONSE: 1) No, but the chairmen of the Democratic and Republican Committees sit on

the County Board of Election Commissioners by virtue of their positions; 2) No.

Opinion No.: 2004-185

Bradford, Jay
State Representative

RE:Does A.C.A. 14-359-105 require approval of "three-fourths (3/4) vote of the elected and qualified members of the city council" to add successor members or does the language found in (b)(2) allow successors to be appointed by a majority when it says, "subject to the approval of the council?" Q2) Would a mayor be allowed to case a vote to pass legislation that is "subject to the approval of the city council?" RESPONSE: Q1) I believe a $\frac{3}{4}$ vote of council members is required to confirm successor municipal airport commissioners, just as it is to confirm initial commissioners. Acts 1949, No. 53, Sec. 4. I believe the answer to your second question is "no." Id.

Opinion No.: 2004-189

Smith, Roger
State Representative

RE:Q1) Does the law allow Driver Control to require one who has multiple convictions for DWI and/or refusal to take a breath test to meet requirements, not ordered by the court, to have his drivers license reinstated? Q2) Does the law allow Driver Control to require one who has multiple convictions for DWI (and has never had his license reinstated) to repeat the Driver Control School (Alcohol Abuse Class or other rehab programs) for each offense to have his drivers license reinstated? Q3) Does the law allow Driver Control to charge one with multiple convictions and a reinstatement fee for each conviction of DWI to have his license reinstated when he has not previously had his license reinstated for any of the offenses? Q4) Is it constitutional for the state to charge and collect money (by way of fees) as a "source of revenue" from people convicted of traffic offenses in order to have

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their drivers license reinstated? If constitutional, does the law allow such charges? RESPONSE: Q1) The law requires the Office of Driver Services to obtain proof that the conditions for reinstatement have been met. Pending judicial or legislative clarification of these requirements it is my opinion that attendance of the alcohol education program is required each time a license is suspended, but not each time an offender receives a DWI. Q2) See response to Q.1. Q3) No. The reinstatement fee can be imposed only once for each reinstatement, not for each DWI offense. Q4) No.

Opinion No.: 2004-190

Whitaker, Ruth
State Senator

RE: Is it legal for the State of Arkansas, more particularly the Department of Health, to have a contract with a lobbyist and/or a lobbying group with the purpose of influencing legislative action or administrative action? Q2) Can funds received from the Department of Health be used for said lobbying purposes? RESPONSE: A full analysis would require reference to all pertinent facts, but as a general matter, without statutory authorization, such a contract is unauthorized.

Opinion No.: 2004-193

Pate, Mark
State Representative

RE: Can the mayor of an incorporated town vote to break a tie or otherwise with the other town council members to fill a vacancy on the council if the council is an even number with the vacancy? RESPONSE: Yes.

Opinion No.: 2004-197

Higginbotham, Steve
State Senator

RE: Even though the City of Palestine has enacted an

ordinance placing ultimate responsibility for a tenant's delinquent water bill on the property owner, what is the legality of the water department holding the owner responsible for charges when the water department allowed the delinquency to occur over many months without terminating water service to the tenant or notifying the property owner of the delinquency? RESPONSE: It is unnecessary to analyze the sufficiency of the notice, because the City does not have the authority in the first instance to impose such charges on the owner of property. See Act 290 of 1985, repealing certain language to this effect in Act 132 of 1933.

Opinion No.: 2004-198

Holt, Jim
State Senator

RE: Q1) Is it legal for a mayor of a second class city to form a police committee, composed of non-elected residents and also non-residents of the city, whose members would be responsible for reviewing candidates for the position of chief of police and have the power to determine the salary for the chief of police as well as assorted other duties which address the police department? Q2) May a mayor of a second class city approve himself a raise without the city council or an ordinance allowing such action? RESPONSE: Q1) No. The formation of such a committee by the mayor would conflict with various provisions of law, discussed in the opinion. Q2) No. See ACA 14-43-409, 14-58-201, 202, 203.

Opinion No.: 2004-199

Baker, Gilbert
State Senator

RE: Does a covered employee who meets the LOPFI definition of totally and permanently disabled from [sic] being a police or fireman, qualify for benefits under A.C.A. 21-5-704? Q2) Does a covered employee who meets the Workers Compensation Commission rating excess of twenty-five percent have to wait one year to

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apply for benefits? Q3) Other than the one-year waiting period to apply, is there a maximum time limit for an application to be filed? Can an employee who met all the qualifications to apply but was unaware of the law, apply five to ten years after becoming disabled? RESPONSE: Decline to answer because of pending litigation.

Opinion No.: 2004-200

Glover, Bobby
State Senator

RE: Does the City of Benton have the authority to pass an ordinance that specifies that only certain brands of equipment may be used by electricians when installing meter combo panels or installing or replacing meter sockets? RESPONSE: No, unless it can be justified on the grounds of public need for the specified brands. See *Upchurch v. Adelsberger*, 231 Ark. 682, 332 S.W.2d 242 (1960).

Opinion No.: 2004-204

Laverty, Randy
State Senator

RE: Q1) Can a person serve as an airport commissioner if the person has a business interest which is related to or regulated by the airport where he or she will serve? Q2) What law or regulation takes precedence regarding the appointment of county airport commissioners? Q3) If a person has a conflict of interest issue, but is otherwise a highly qualified individual, may such person serve as a commissioner? RESPONSE: Q1) No, assuming the commission is one created under the authority of ACA 14-357-101 or is another county entity that is subject to ACA 14-14-1202. Under certain factual circumstances, an exception to this prohibition may apply. See ACA 14-14-1202(c)(2). Even if the commission is not subject to ACA 14-14-1202, the individual should be cognizant of ACA 21-8-304, and the common law prohibition of conflicts of interest. Q2) See response to Q.1. Q3) No. See response to Q.1.

Opinion No.: 2004-205

Miller, Paul
State Senator

RE: Pursuant to provisions of the Freedom of Information Act (FOIA), are the cash flow statement, income statement, balance sheet, 4th quarter budget comparison report, and monthly manager activity report of the Cherokee Village Waterworks Facilities Board subject to inspection and copying? RESPONSE: Yes, as long as the records do not relate to security matters, which seems unlikely.

Opinion No.: 2004-209

Faris, Steve
State Senator

RE: Q1) Was it constitutionally permissible for the Employment Security Division ("ESD") to transfer the operational control of employees to the Workforce Investment Board ("WIB") without first obtaining legislative approval and was the subsequent payment of salaries by ESD for the affected employees also constitutionally permissible? Q2) Was the payment of Mr. Brady's salary as Director of the Washington, D.C. Office with Special Fund monies in conflict with the Arkansas Code or the Arkansas Constitution? RESPONSE: Q1) It was constitutionally permissible, but statutorily impermissible. See powers of WIB, as set forth in ACA 15-4-2206. ESD's continued payment of these employees' salaries was not only permissible, but was constitutionally required. See Art. 16, 4 and Art. 5, 29. Q2) Payment of Mr. Brady's salary out of the ESD Special Fund conflicts with both the Ark. Const. and the Code. See Art. 16, 4, Art. 5, 29, and ACA 19-5-984.

Opinion No.: 2004-211

Harrod, Roger
General Counsel, AR ESD

RE: Is the decision of the custodian to withhold release of evaluation/job performance records because the

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deceased employee in question was never suspended or terminated, and to release personnel records with exempt information redacted consistent with provisions of the Freedom of Information Act (FOIA) in response to an FOIA request to review and/or copy personnel records of a former employee who committed suicide at his home, but while employed with the agency? RESPONSE: Generally yes. In addition, it should be noted that this office has taken the position that an employee's privacy interest in personnel records does not lapse at the time of death.

Opinion No.: 2004-212

Roberson, Jim
Lonoke County Sheriff

RE: Sheriff Roberson has asked, in response to a Freedom of Information Act (FOIA) request for copies of all reports, statements, letters of suspension or termination regarding a sheriff's deputy, which records are exempt from disclosure under the Act? RESPONSE: The opinion sets forth the applicable standard to determine exemption from disclosure of employee evaluation/job performance records. Since one document mentions a coworker, rendering the document a personnel record as to her, the opinion further sets forth the standard for exempting personnel records. The opinion further reviews the constitutional privacy interests of the sheriff's deputy, his coworker and third parties mentioned in the documents.

Opinion No.: 2004-219

Smith, Jeff
The Morning News

RE: Was the selective release of documents in response to a Freedom of Information Act (FOIA) request from The Morning News for "all files . . . Regarding the recent retirement of . . . A foreign languages professor" consistent with provisions of the FOIA? RESPONSE: I cannot opine on the appropriateness of the University's withholding certain

documents because they were not provided with the request. The opinion sets forth the standards the custodian should have used in determining what to withhold.

Opinion No.: 2004-225

Llewellyn, James M., Jr.
Thompson & Llewellyn

RE: Is the decision of the custodian of records to withhold release of all electronic email addresses of certified K-12 classroom teachers, principals and certified support personnel maintained by the district in response to a Freedom of Information Act (FOIA) request consistent with provisions of the FOIA? RESPONSE: As a general matter, employees' work e-mail addresses should be released, but their personal e-mail addresses, as a general matter, should not be released.

Opinion No.: 2004-226

Glover, Bobby L.
State Senator

RE: Can the electorate of Lonoke County vote to reallocate an existing one percent (1%) sales and use tax to take 15% from the cities and 15% from the county to create a special fund for other purposes? RESPONSE: Generally, yes. See attached Op. 2004-033 for discussion.

ADOPTED RULES AND REGULATIONS

APPRAISER LICENSING & CERTIFICATION BOARD

Docket No.: 151.00.04--001
Effective Date: 8/15/04
Contact Person: Jim Martin
Telephone: (501) 296-1843

Revised Rules and Regulations

ALCOHOL AND DRUG ABUSE COUNCIL

Docket No.: 180.00.04--001
Effective Date: 8/13/04
Contact Person: Bill Viser
Telephone: (870) 245-5524

Emergency Rule: Rule 1 - Code of Ethics

CRIME VICTIMS REPARATION BOARD

Docket No.: 143.00.04--001
Effective Date: 8/9/04
Contact Person: Mica Strother-Hicks
Telephone: (501) 682-3644

Rule Numbers 10 (2), 12(7)(8), and 24

DEPARTMENT OF COMMUNITY CORRECTION

Docket No.: 159.00.04--001
Effective Date: 8/22/04
Contact Person: Veter Howard
Telephone: (501) 682-9568

AR 7.24 - Resident Visitation

ETHICS COMMISSION

Docket No.: 153.00.04--001
Effective Date: 7/26/04
Contact Person: Graham Sloan
Telephone: (501) 324-9600

Rules on Conflicts

FINANCE & ADMINISTRATION

Revenue Division

Docket No.: 006.05.04--002
Effective Date: 8/16/04
Contact Person: Linda Holmstrom
Telephone: (501) 682-7751

Regulation 2004-2 -- Standard Mileage Rates for Income Tax Purposes

GAME & FISH COMMISSION

Docket No.: 002.00.04--006
Effective Date: 8/15/04
Contact Person: Jim Goodhart
Telephone: (501) 223-6327

Approved 2004 - 2005 Early Migratory Bird Seasons and Codes

Docket No.: 002.00.04--007
Effective Date: 8/15/04
Contact Person: Jim Goodhart
Telephone: (501) 223-6327

ADOPTED RULES AND REGULATIONS

Approved 2004-2005 Hunting Codes

HEALTH DEPARTMENT

Epidemiology

Docket No.: 007.15.04--002
Effective Date: 9/1/04
Contact Person: Charles Beets
Telephone: (501) 661-2784

Rules Pertaining to Immunization Requirements

HUMAN SERVICES

Medical Services

Docket No.: 016.06.04--024
Effective Date: 8/2/04
Contact Person: Joie Wallis
Telephone: (501) 682-5424

State Child Health Insurance Program (SCHIP) State Plan Amendment

Docket No.: 016.06.04--043
Effective Date: 9/1/04
Contact Person: Renita Honorable
Telephone: (501) 682-8577

Pharmacy Update Transmittal #67

Docket No.: 016.06.04--056
Effective Date: 8/1/04
Contact Person: Will Taylor
Telephone: (501) 682-8362

Personal Care Update Transmittal #57

Behavioral Health Services

Docket No.: 016.23.04--001
Effective Date: 8/20/04
Contact Person: Anne Wells
Telephone: (501) 686-9489

Child and Adolescent Service System Program (CASSP) Authorization to Disclose Health Information Form

Children & Family Services

Docket No.: 016.15.04--003
Effective Date: 8/19/04
Contact Person: Vivian Jackson
Telephone: (501) 682-1577

Annual Progress and Services Report (APSR) FFY 2003

County Operations

Docket No.: 016.20.04--002
Effective Date: 8/6/04
Contact Person: Linda Greer
Telephone: (501) 682-8257

MS 3334.3 and MS 3336.10: Transfer of Resources - Updating Divisor for Determining Uncompensated Value and Period of Ineligibility

ADOPTED RULES AND REGULATIONS

Docket No.: 016.20.04--005
Effective Date: 8/23/04
Contact Person: Linda Greer
Telephone: (501) 682-8257

State Plan IV-A: Transitional Employment Assistance (TEA) Policy 5140 - 5145, Section 6.5.2 -- Extended Support Service Transportation Assistance

Docket No.: 016.20.04--007
Effective Date: 8/1/04
Contact Person: Linda Greer
Telephone: (501) 682-8257

MS 26115 and MS 26145 - Adding Spousal Resources Provisions to ElderChoices

POLLUTION CONTROL & ECOLOGY

Hazardous Waste

Docket No.: 014.09.04--001
Effective Date: 8/15/04
Contact Person: Mike Bates
Telephone: (501) 682-0831

Regulation 30 - Hazardous Substance Remedial Action Trust Fund Priority List

Solid Waste Control

Docket No.: 014.03.04--001
Effective Date: 8/15/04
Contact Person: Anne Weinstein
Telephone: (501) 682-0743

Regulation 16 - Waste Reduction, Reuse, or Recycling Tax Credits

PUBLIC SERVICE COMMISSION

Utilities Section

Docket No.: 126.03.04--001
Effective Date: 7/26/04
Contact Person: Diana Wilson
Telephone: (501) 682-5782

Arkansas Intrastate Carrier Common Line Pool Rules

INSURANCE DEPARTMENT

***** No Insurance Orders were filed with the *Arkansas Register* during the past filing period for publication in this edition.**

ORDERS AND NOTICES

LEGISLATIVE AUDIT

Agency

Period Covered

***** No Legislative Audit Notices were filed with the *Arkansas Register* during the past filing period for publication in this edition.**

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ARKANSAS REGISTER

Published by:
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State Capitol, Room 026
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